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SERVICE DATE - MAY 14, 1998

SURFACE TRANSPORTATION BOARD<sup>1</sup>

DECISION

Finance Docket No. 32112

CLARK SHORTLINE RAILROAD COMPANY—ACQUISITION  
AND OPERATION EXEMPTION—INDIANA PORT COMMISSION

Finance Docket No. 32113

SOUTHWIND SHORTLINE RAILROAD COMPANY—ACQUISITION  
AND OPERATION EXEMPTION—INDIANA PORT COMMISSION

Finance Docket No. 32114

INDIANA PORTS RAILROAD HOLDING CORPORATION—CONTINUANCE IN  
CONTROL EXEMPTION—CLARK SHORTLINE RAILROAD COMPANY AND  
SOUTHWIND SHORTLINE RAILROAD COMPANY<sup>2</sup>

Decided: May 5, 1998

We are denying petitions to revoke the exemptions in these proceedings.

BACKGROUND

The Indiana Port Commission (IPC) is a state agency that administers three public ports in the State of Indiana. Through its subsidiary, Indiana Ports Railroad Holding Company (IPRHC),

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<sup>1</sup> The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 10901 and 11323. Therefore, this decision applies the law in effect prior to the ICCTA, and citations are to the former sections of the statute, unless otherwise indicated.

<sup>2</sup> This proceeding was originally titled: Indiana Ports Railroad Holding Corporation—Continuance in Control Exemption—Burns Harbor Shortline Railroad Company, Clark Shortline Railroad Company, and Southwind Shortline Railroad Company.

IPC organized three shortline railroads to acquire and operate terminal track located at the ports. Each of the port lines had previously been owned by IPC and had been operated as an exempt spur or terminal track. Acquisition and operation proposals were concurrently filed on July 21, 1992, as notices of exemption under 49 U.S.C. 10505 and 49 CFR 1150, subpart D, together with a related continuance in control exemption notice under 49 U.S.C. 10505 and 49 CFR 1180.2(d)(2). The notices of exemption were served and published in the Federal Register on August 13, 1992.

The first notice of exemption was filed in Finance Docket No. 32104<sup>3</sup> by Burns Harbor Shortline Railroad Company (BHSL) proposing to acquire and operate 5.27 miles of rail line in Burns International Harbor, Porter County, IN. At that time, the line was operated by Consolidated Rail Corporation (Conrail) under agreement with IPC. BHSL filed on July 21, 1992, a related petition for exemption in Finance Docket No. 32105,<sup>4</sup> under 49 U.S.C. 10505 and 49 CFR part 1121, to cover a proposed extension of its line over tracks of Conrail to connect directly with other carriers.

The second notice of exemption was filed in Finance Docket No. 32112 by Clark Shortline Railroad Company (CLSL) proposing to acquire and operate a 32,110-foot line at the Clark Maritime Centre, Clark County, IN (Clark Centre). The line was then operated by Conrail, CSX Transportation, Inc. (CSXT), and MG Rail, Inc. (MGRI), under agreements with IPC.

The third notice of exemption was filed in Finance Docket No. 32113 by Southwind Shortline Railroad Company (SWSL) proposing to acquire and operate a 33,012-foot line in Southwind Maritime Centre, Posey County, IN (Southwind Centre). At the time, the line was operated by CSXT.

A related notice of exemption was filed in Finance Docket No. 32114 by IPRHC proposing to continue in control of BHSL, CLSL and SWSL upon each becoming a carrier under its respective notice of exemption.

Conrail opposed the proposals in Finance Docket Nos. 32104, 32105, and 32114. BLE, which opposed all proposals, filed petitions to revoke the exemptions in Finance Docket Nos. 32112 and 32113.

On June 15, 1993, BHSL filed petitions asking permission to withdraw the notice of exemption in Finance Docket No. 32104 and the petition for exemption in Finance Docket No. 32105. On the same date, IPRHC filed a petition asking permission to amend the notice of

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<sup>3</sup> Burns Harbor Shortline Company—Acquisition and Operation Exemption—Indiana Port Commission.

<sup>4</sup> Burns Harbor Shortline Railroad Company—Extension and Operation Exemption—In Porter County, IN.

exemption in Finance Docket No. 32114 to delete reference to BHSL as a railroad over which IPRHC seeks to remain in control. Conrail and BLE did not object to these requests. On June 25, 1993, decisions were served granting the petitions to withdraw and amend.

There remains to be resolved BLE's petitions to revoke the exemptions in Finance Docket Nos. 32112 and 32113. BLE has questioned whether the ICC had jurisdiction to exempt these transactions. The union asserts that IPC did not conduct rail operations or hold itself out to perform rail operations and, thus, is not a rail carrier. Because each of the lines was operated by a carrier (Conrail, CSXT or MGRI), BLE asserts that IPC may not unilaterally displace the existing operator. Furthermore, BLE submits that no other carrier may obtain the right to operate through an exemption from 49 U.S.C. 10901. BLE also contends that IPC, through IPRHC, created the short line railroads to circumvent IPC's commitments to the operating carrier and that carrier's employees. Finally, BLE maintains that, because IPRHC is creating rail subsidiaries, 49 U.S.C. 11343 governs, rather than 49 U.S.C. 10901.

CLSL and SWSL replied that: (1) the line each prospective carrier is acquiring is a line of railroad; (2) each prospective carrier will serve enough shippers to be a railroad; and (3) each prospective carrier will hold itself out to be a railroad. CLSL and SWSL also cited cases where the ICC asserted jurisdiction over rail carriers seeking to serve marine terminals.<sup>5</sup> Responding to assertions that the current operators will be displaced, CLSL and SWSL contended that current operators could possibly continue to serve each facility, either as contract operators or through trackage rights.

In a decision served October 28, 1997, we asked whether the transactions here have gone forward and whether CLSL and SWSL acquired the lines and assumed the status of common carrier railroads. We noted that rail operations at the Clark Centre and the Southwind Centre apparently have not changed, and that the tracks at these ports are still being operated by Conrail, CSXT, and MGRI as terminal track. In view of these circumstances, we indicated that a decision on issues raised in BLE's petitions might not be required. Accordingly, we directed the parties to show cause why the Board should not vacate the exemptions in these proceedings and dismiss these proceedings.

On November 25, 1997, IPC, IPRHC, CLSL and SWSL (jointly, applicants) responded to our show cause order. BLE did not respond.

In their response, applicants state that we incorrectly believed that the transactions had not gone forward. In support, they submitted a verified statement from Donald W. Miller, Jr., Port

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<sup>5</sup> Assoc. of P&C Dock Longshoremen v. The Pitts. & Conneaut, 8 I.C.C.2d 280 (1992); , Jackson County Port Authority—Construction Exemption—Pascagoula, MS, Finance Docket No. 31536 (ICC served Aug. 21, 1990); Columbia-Astoria Rail Service Inc.—Construction and Operation Exemption--At Tongue Point, OR, Finance Docket No. 31304 (ICC served Nov. 1, 1988); and Louisville & Jefferson Co & CSX Const. & Oper. Jeff. KY, 4 I.C.C.2d 749 (1988).

Director of the Clark Centre, who testifies that CLSL acquired the lines within the Clark Centre pursuant to the exemption. Mr. Miller says that the CLSL is operating as a rail carrier in the Clark Centre, and rail service is being performed by MGRI under contract. He states that cars are handled by MGRI for the account of CLSL and are interchanged with the Louisville & Indiana Railroad Company (LIRC)<sup>6</sup> on designated interchange tracks.

Applicants also submitted a verified statement from Donald R. Snyder, Port Director of the Southwind Centre, who testifies that SWSL acquired the lines within the Southwind Centre. He states that SWSL is conducting operations as a rail carrier, and rail service is being performed by two operators, apparently under contract. According to Mr. Snyder, cars within the Southwind Centre are handed for SWSL's account by the two operators and are interchanged with CSXT on designated interchange tracks. In addition, several industries in the port facility are being switched directly by CSXT.

Mr. Snyder indicates further that IPC has negotiated leases with two grain companies that are building new soybean processing plants at the Southwind Centre. The new industries are expected to generate between 7,000 and 10,000 carloads annually. To accommodate the increased traffic, Mr. Snyder states that SWSL plans to add storage track and to reorder switching arrangements within the port. When the plants begin operating, Mr. Snyder says that SWSL expects that the new facilities will be served for SWSL's account by the two current operators or another shortline operator that would be engaged to perform rail operations.

#### DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10505(d), now 10502(d), we may revoke an exemption when we find that regulation is needed to carry out the rail transportation policy set forth at 49 U.S.C. 10101a (now 10101). A notice of exemption is void ab initio if it contains false or misleading information. As the party seeking revocation, BLE has the burden of proving that regulation of the transaction is necessary or that the notices of exemption in these proceedings contain false or misleading information. As we noted, BLE has not submitted any additional evidence or argument on the issues raised in its petition to revoke, or indicated whether it continues to oppose the transactions.

In its petition to revoke, BLE has questioned whether the transactions were subject to the ICC's (and now the Board's) jurisdiction. Addressing this issue, applicants assert that CLSL and SWSL did not intend to become line haul carriers, but both made it clear that they proposed to become port terminal switching railroads within the meaning of 49 U.S.C. 10102(5). In support,

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<sup>6</sup> Apparently, LIRC purchased Conrail's lines serving the Clark Centre as part of its purchase of 115 miles of Conrail's lines known as the Louisville Cluster. See Louisville & Indiana Railroad Company—Acquisition and Operation Exemption—Consolidated Rail Corporation, Finance Docket No. 32240 (ICC served May 26, 1995, petition to revoke denied by decision served Jan. 19, 1994).

they again cite cases wherein the ICC asserted jurisdiction over rail carriers seeking to serve marine terminals. (See n. 5). Citing Effingham Railroad Company—Petition for Declaratory Order—Construction at Effingham, IL, STB Finance Docket No. 41986 (STB served Sept. 12, 1997), applicants assert that CLSL and SWSL intend to be rail carriers and part of the national rail system. Even though both carriers have elected to have operators perform their port operations, that fact should not, in their view, undermine their status as carriers subject to the Board's jurisdiction.

The record before us shows that IPC formed CLSL and SWSL, as subsidiaries of IPRHC, to acquire track and to operate as railroads subject to our jurisdiction, to provide service to shippers at the Clark Centre and Southwind Centre, and to hold themselves out as common carriers. Even though CLSL and SWSL have contracted with operators who actually perform rail service, CLSL and SWSL have the residual common carrier obligation to provide service at the respective facilities. These factors, which BLE does not dispute, supported the ICC's jurisdiction over the transactions and permitted it to issue the notices of exemption to CLSL and SWSL under 49 CFR 1150, subpart D. Moreover, the proposed operations by CLSL and SWSL are comparable to rail operations at other government-owned port facilities that have been authorized. North Carolina Port Railway Commission—Acquisition and Operation in New Hanover and Carteret Counties, NC, Finance Docket No. 29423 (ICC served Dec. 29, 1980; petition for reconsideration denied, Mar. 25, 1981).

BLE was concerned that employees of Conrail, CSXT and MGRI could lose their jobs if those operators were displaced by CLSL and SWSL. Yet, as applicants noted, LIRC (which acquired Conrail's lines at Clark Centre) and CSXT continue to serve industries within the respective port facilities and have not been replaced. Also, MGRI continues to operate under contract with CLSL at Clark Centre. Moreover, we note that BLE has not replied to our recent order or otherwise indicated continued interest in this proceeding.

Accordingly, we will deny the petitions to revoke.

This action will not significantly affect either the quality of the human environment or conservation of energy resources.

It is ordered:

1. BLE's petitions to revoke the notices of exemption in Finance Docket No. 32112 and Finance No. 32113 are denied.

Finance Docket No. 32112, et al.

2. This decision is effective on June 13, 1998.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary